169/03-1972.A #27915

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS ASSOCIATION OF COUNTY ENGINEERS	)	
	)	NO. 02-0780
REQUEST FOR DECLARATORY RULING CONCERNING THE UNDERGROUND FACILITIES DAMAGE PREVENTION ACT (220 ILCS 50)	)	

PETITION FOR REHEARING

NOW COME the Petitioners, Illinois Association of County Engineers (IACE) and Township Officials of Illinois (TOI), by and through their attorneys, Judge, James & Kujawa, LLC, and applies for rehearing pursuant to §200.880 of Rules of Practice of the Illinois Commerce Commission, and in support thereof, states as follows:

On November 22, 2002, the Illinois Association of County Engineers (IACE) filed a Request for Declaratory Ruling from the Illinois Commerce Commission pursuant to §200.220 of the Rules of Practice. The Commission issued its final order June 18, 2003 denying the request for declaratory ruling of IACE. The Commission made certain findings in its order denying the declaratory ruling requested by IACE. IACE seeks a Rehearing on its request for declaratory ruling and as to the contents of the Commission's June 18, 2003 order.

ISSUES PRESENTED FOR REVIEW

I. THE COMMISSION LACKED JURISDICTION TO ISSUE THE DECLARATORY RULING REQUESTED BY IACE.

A. THE ORDER OF JUNE 18, 2003 IS VOID AS THE COMMISSION EXCEEDED ITS

STATUTORY AUTHORITY ISSUING AN ORDER ON A PETITION FOR DECLARATORY RULING THAT WAS NOT REQUESTED BY AN "AFFECTED PERSON."

B. BECAUSE COUNTIES AND TOWNSHIPS ARE NOT "MUNICIPALLY OWNED" UTILITIES THE COMMISSION HAS NO SPECIFIC SUBJECT MATTER JURISDICTION OVER THEM.

II. THE COMMISSION ERRED IN FINDING THAT COUNTIES AND TOWNSHIPS ARE SUBJECT TO THE ILLINOIS UNDERGROUND UTILITIES FACILITIES DAMAGE PREVENTION ACT AS "MUNICIPALLY OWNED" UTILITIES.

III. THE COMMISSION ERRED IN FINDING THAT STORM SEWERS, CULVERTS, FIELD TILE AND ELECTRICAL LINES SERVING TRAFFIC CONTROL DEVICES ARE UNDERGROUND UTILITIES SUBJECT TO THE ACT WHERE THOSE ITEMS ARE LOCATED ON THE COUNTY OR TOWNSHIP PROPERTY AND ARE NOT USED TO PROVIDE UTILITY SERVICES TO CUSTOMERS.

A. COUNTIES AND TOWNSHIPS, IN USING ELECTRICITY FOR SOME TRAFFIC CONTROL SIGNALS, ARE CONSUMERS OF A UTILITY SERVICE AND NOT PROVIDERS OF A UTILITY SERVICE.

B. COUNTIES AND TOWNSHIPS WHICH MAY HAVE STORM SEWERS, CULVERTS OR FIELD TILE ON THEIR PROPERTY ARE NOT PROVIDING UTILITY SERVICES TO CUSTOMERS.

ARGUMENT

I. THE COMMISSION LACKED JURISDICTION TO ISSUE THE DECLARATORY RULING REQUESTED BY IACE.

The Illinois Commerce Commission is an administrative agency created by state statute. The Commission only has those powers given it by the legislature through statute.

Business and Professional People for the Public Interest et al v. Illinois Commerce Commission, 136 Ill.2d 192, 555 N.E.2d 693, 697, 716 (1990). An agency such as the Commission only has the authority given it by the legislature through the statutes. If an agency acts outside its statutory authority, it acts without jurisdiction. *Illinois Municipal Electric Agency v. Illinois Commerce Commission*, 247 Ill. App.3d 857, 617 N.E.2d 1363, 1364-5 (4th Dist. 1993); *Business and Professional People*, 555 N.E. 2d at 716.

To determine if the Commission exceeded its statutory grant of authority, acting without jurisdiction, we need to look at what authority and power was granted to the Commission by the legislature.

A. THE ORDER OF JUNE 18, 2003 IS VOID AS THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY ISSUING AN ORDER ON A PETITION FOR DECLARATORY RULING THAT WAS NOT REQUESTED BY AN "AFFECTED PERSON."

The Illinois Commerce Commission has been given authority to issue declaratory rulings. That authority is defined in §200.220 as follows:

Section 200.220 Declaratory Rulings

a. When requested by the *affected person*, the Commission may in its sole discretion issue a declaratory ruling with respect to:

1. The applicability of any statutory provision enforced by the Commission or any Commission rule to the *person(s)* requesting a declaratory ruling; and

2. Whether the *person(s)* compliance with a Federal Rule will be accepted as compliance with a similar Commission rule.

b. A request for a declaratory ruling:

1. Shall be captioned as such and shall contain a

> complete statement of the facts and grounds prompting the request, *including a full disclosure of the requester's interest*; . . . (Emphasis added.)

Under Section 200.220 the Commission may issue a declaratory ruling when requested to do so by an a*ffected person*. 200.220 (a). The Commission may issue a declaratory ruling as to the applicability of any statutory provision enforced by the Commission or any Commission rule to the *person(s)* requesting a declaratory ruling. 200.220 (a)(1).

There are two distinct requirements to be met for the Commission to exercise its statutory grant of authority to issue a declaratory ruling. First, the request for the declaratory ruling must come from an a*ffected person*. 200.220 (a). Second, the Commission may issue a declaratory ruling as to the applicability of any statutory provision enforced by the Commission or any Commission rule to the person who made the request for declaratory ruling. 200.220 (a)(1).

The request for declaratory ruling in this case was made by the Illinois Association of County Engineers (IACE). IACE did not request a declaratory ruling on its own behalf. Instead IACE requested a declaratory ruling on a statute that potentially impacts hundred of counties and townships throughout the State of Illinois. The *affected persons* are not IACE or TOI but instead the individual counties and townships throughout our State.

The request to the Commission by the Illinois Association of County Engineers (IACE), not for itself but for counties and townships, while for a well-intended and good purpose, placed the Commission in the difficult position. The Commission was asked to render a ruling by a "non-affected person" (IACE) which it lacks jurisdiction to do and it was asked to rule in a vacuum – because no county or township requested a ruling as an "affected

person" in a specific factual setting, there was no evidence, compelling the Commission to theorize or speculate. Unfortunately, this has resulted in a void ruling.

The Commission exceeded the scope of its statutory authority in issuing the June 18, 2003 order in response to a request for declaratory ruling when the request was not made by an "affected person." IACE is not "affected". The Commission was not requested to provide a declaratory ruling as any statute or Commission rule affecting IACE. Instead, the Commission was requested to provide a ruling which affects counties and townships throughout the State of Illinois.

The words "affect" means "to produce an effect upon as (a) to produce a material influence upon or alteration in (paralysis affected his limbs) or (b) to act upon (as a person or a person's mind or feelings) so as to effect a response. *Merriam-Webster Dictionary.*

The Commission may issue a declaratory ruling when requested to do so by an affected person. That means the Commission may issue a declaratory ruling when the ruling is requested by the person upon whom the ruling may have an effect. The ruling requested by IACE has no effect upon the Illinois Association of County Engineers.

The legislature recognized the importance that a declaratory ruling only be requested by an affected person. In a request for declaratory ruling the Commission is to be provided a "full disclosure of the requestor's interest." 200.220(b)(1). The petition submitted by IACE was did not provide a disclosure of the interest of IACE. IACE sought a ruling that "counties and townships" are not required to participate in the state-wide one-call notice system as provided for in the Illinois Underground Utility Facilities Damage Prevention Act. The ruling that was sought would be effective not as to IACE or TOI but as to the individual counties and townships in Illinois.

The Commission has not always been empowered to made declaratory rulings. In *Illinois Municipal Electric Agency v. Illinois Commerce Commission*, 247 Ill. App.3d 857, 617 N.E.2d 1363 (4th Dist. 1993) the Illinois Municipal Electric Agency (IMEA) filed a petition seeking an order from the Commission confirming it did not have jurisdiction over a contract IMEA entered into with the City. The Commission denied the petition finding it was without authority to issue such a judgment.

The Appellate Court stated the general rule that:

> "An administrative agency such as the Commerce Commission derives its power to act solely from the statute by which it was created. An agency action which exceeds its authority is void. Chemed Corp. v. State (1989), 186 Ill. App.3d 402, 410, 134 Ill. Dec. 313, 318, 542 N.E.2d 492, 497. 617 N.E.2d at 1365."

The Appellate Court agreed with the Commission's denial of the request for ruling. A request for a ruling was not provided for in the law as it was then codified. The request did not meet the statutory definition of a contested case as the statute then existed. The Appellate Court agreed that the Commission correctly determined it was without authority to issue the ruling sought by IMEA since it would be a declaratory ruling which, at the time, was not allowed by statute.

Subsequent to the *IMEA* case the legislature has amended the statute and has now authorized the Commission to provide declaratory rulings in limited circumstances. The legislature has only authorized the Commission to issue declaratory rulings when requested by the "affected person." The Commission is not authorized to issue declaratory rulings merely because someone has an interest or wants to know how the Commission might interpret a statute or rule that might apply to someone other than the requestor. Declaratory rulings may only be provided by the Commission when requested by the "affected person."

In issuing the June 18, 2003 order the Commission acted beyond its authority. As such the action of the Commission was without jurisdiction and its order is void.

In *Business and Professional People for the Public Interest, et al. v. Illinois Commerce Commission*, 136 Ill.2d 192, 555 N.E.2nd 693 (1990) the Supreme Court found that the Commission exceeded its statutory authority. In going beyond the scope of its authority and issuing an order if violated the statute which empowered it. The Supreme Court reversed the order if the Commission on both jurisdictional and nonjurisdictional grounds. With respect to jurisdiction, the Supreme Court stated:

> "An administrative agency is different from a court because an agency only has the authorization given to it by the legislature through the statutes. Consequently, to the extent an agency acts outside its statutory authority, it acts without jurisdiction. (*City of Chicago v. Fair Employment Practices Comm.* (1976), 65 Ill.2d 108, 112-13, 2 Ill. Dec. 711, 357 N.E.2d 1154.) "The term "jurisdiction," while not strictly applicable to an administrative body, may be employed to designate the authority of the administrative body to act ***" (*Newkirk v. Bigard* (1985), 109 Ill.2d 28, 36, 92 Ill. Dec. 510, 485 N.E.2d 321.) Thus, in administrative law, the term "jurisdiction" has three aspects: (1) personal jurisdiction - the agency's authority over the parties and interveners involved in the proceedings, (2) subject matter jurisdiction - the agency's power "to hear and determine causes of the general class of cases to which the particular case belongs" (*Newkirk,* 109 Ill.2d at 36, 92 Ill. Dec. 510, 485 N.E.2d 321), and (3) an agency's scope of authority under the statutes. As this court stated in *Chicago*:
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> > "We believe the j*urisdictional rule* applicable to the Commission is analogous to that governing the courts of limited jurisdiction and powers formerly existing in our pre-1964 judicial system. In the context of cases involving the validity of orders or judgment of those courts, this court has said: "A judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, *or which lacks the inherent power to make or enter the particular order involved,* is void, and may be attacked at anytime or in any court, either directly or collaterally." (Emphasis added.) *Barnard v. Michael* (1945), 392 Ill. 130, 135, 63 N.E.2d 858. [Citations.]
> >
> > Since the Commission is a statutory creature, its powers are

> dependent thereon, and it must find within the statute the authority which it claims. [Citations.] Such agencies have no general or common law powers. It is apparent, therefore, that the Commission was powerless to award attorneys fees *** unless statutory authority to do so exists. *Absent such authorization, the Commission exceeded its jurisdiction* with a void order. (Emphasis added.) (*Chicago*, 65 Ill.2d at 112-13, 2 Ill. Dec. 711, 357 N.E.2d 1154.)
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> See *Newkirk*, 109 Ill.2d at 36-7, 92 Ill. Dec. 510, 485 N.E.2d 321. 555 N.E.2d at 716-7 [Emphasis in original.]

See also *Abbott Laboratories, Inc., v. Illinois Commerce Commission*, 289 Ill. App.3d 705, 682, N.E.2d 340, 346 (1st Dist. 1997).

The Commission has exceeded the scope of its authority as granted to it by the legislature when it issued its June 18, 2003, order in response to a request for declaratory ruling from an association that was not an "affected person." The Commission therefore acted without authority. The order of June 18, 2003 is void and should be withdrawn or revoked by the Commission.

The Commission cannot violate the Act which grants it its powers. *Business and Professional People*, 555 N.E.2d at 709. The Commission has violated the Act in ruling on a request for declaratory ruling when requested to do so not by an association that will not be affected by the ruling. A Commerce Commission order that is entered without jurisdiction is subject to being reversed by a court of review. 220 ILCS 5/1-101 *et seq.*

In *Business and Professional People* the Supreme Court recognized that an agency acting beyond its statutory grant of authority, that is acting without authorization, is exceeding its jurisdiction. The Supreme Court stated:

> "A decision by an agency which lacks that statutory power to enter the decision is treated the same as a decision by an agency which lacks personal or subject matter jurisdiction - the decisions are void. Moreover, "jurisdiction" and "authority" have been used interchangeably in certain

> administrative law contexts. As stated in *Newkirk*, "[t]he term "jurisdiction" *** may be employed to designate the authority of the administrative body to act." *Newkirk*, 109 Ill.2d at 36, 92 Ill. Dec. 510, 485 N.E.2d 321; See *Chicago*, 65 Ill.2d at 113, 2 Ill. Dec. 711, 357 N.E.2d 1154 ("Absent such [statutory] authorization, the Commission exceeded its jurisdiction with a void order"). 555 N.E.2d at 717.

The Commission has statutory power to make a declaratory ruling when requested to by "the affected person." The Commission is not authorized to issue declaratory rulings when requested by interested persons who are not "the affected person." The Commission can easily tell if the ruling is requested by the "affected person" if the statute or rule the Commission is being asked to interpret will have an effect on the person who makes the request. Here the Commission exceeded its jurisdiction, by acting without statutory authority. The Commission has issued a void order.

The purpose behind allowing the Commission to entertain a request for declaratory ruling, made by an "affected person," is easily seen. If rulings are requested by persons who are not "affected" the Commission may end up spending a lot of its time needlessly. If rulings are requested by persons who are not "affected" there may be insufficient facts presented for the Commission to make a meaningful ruling. As will be seen in the arguments raised below there are myriad of facts and scenarios that could be raised by the many individual counties and townships throughout Illinois who are "affected persons" as a result of the Commission's June 18, 2003 order. In the petition for declaratory ruling of IACE the Commission was not given specific facts as to how its declaratory ruling may effect any individual county and township. That is problematic.

The Commission recognized it did not have enough facts to make a determination as to whether any particular county or township might be a "mutually owned" utility. Similarly, the Commission was without sufficient facts to determine whether any particular county or

township might be providing a utility service. Had a proper request for declaratory ruling been made by an "affected person" the Commission might have had sufficient facts to reach a proper declaratory ruling.

Because a request for declaratory ruling was made by IACE who is not an "affected person" it is respectfully requested that the Commission revoke its June 18, 2003, order as allowed by Section 200.220(j) of the Rules of Practice.

B. BECAUSE COUNTIES AND TOWNSHIPS ARE NOT "MUNICIPALLY OWNED" UTILITIES THE COMMISSION HAS NO SPECIFIC SUBJECT MATTER JURISDICTION OVER THEM.

If the Commission has no specific subject matter jurisdiction, the Commission had no power to enter its June 18, 2003, order. The Commission's order of June 18, 2003 concluded that counties and townships can be "municipally owned" utilities. An order which is entered without subject matter jurisdiction is a void order.

To render a ruling, as requested, in this matter, the Commission was obliged to possess subject-matter jurisdiction in two respects: (1) general subject-matter jurisdiction or power to enforce the Underground Facilities Damage Prevention Act; and (2) specific subject-matter jurisdiction or power to make the ruling requested. *Kulikowski v. Carson*, 305 IA3d 110, 710 N.E.2d 1275 (3rd Dist. 1999) (Circuit court had general subject-matter jurisdiction but no specific subject-matter jurisdiction to enter default judgment against bank as trustee of naked land trust holding title only under Dram Shop Act suit rendering property owner where alcohol sold liable under Act – judgment void as bank as trustee had no power to manage or control property, merely holding legal title, as required for liability under the Act).

The Commission had general subject-matter jurisdiction but lacked specific subject-matter jurisdiction to rule as it did for two reasons:

(1) The Commission's specific subject-matter jurisdiction extends only to "affected persons" and IACE was not an "affected person."

(2) The Commission's specific subject-matter jurisdiction extends only to the 3 types of utilities subject to the Underground Utility Facilities Damage Prevention Act: (1) a public utility; (2) a municipality owned utility; and (3) a mutually owned utility and counties and townships are not one of such utilities within the Act.

In *CPM Productions, Inc. v. Mobb Deep, Inc.*, 318 Ill. App.3d 369, 742 N.E.2d 393 (1st Dist. 2000) the court was found to have no jurisdiction to enter judgment on an arbitration award pursuant to the Uniform Arbitration Act as the judgment was contrary to the agreement of the parties. The parties had agreed to arbitrate their dispute before AAA in New York. The arbitration upon which judgment was entered took place in Chicago.

In CPM Productions the plaintiff contracted with the defendant to perform a concert. The contract provided that any dispute would be arbitrated under American Arbitration Rules in New York. The defendant failed to perform at the concert and plaintiff proceeded to arbitrate its claim before AAA in Chicago. The defendant did not appear. Plaintiff obtained an arbitration award and thereafter filed a complaint in the Circuit Court of Cook County to confirm the award under the Uniform Arbitration Act.

After the trial court entered judgment on the award the defendant appealed. The First District Appellate Court reversed finding the trial court's judgment was void as beyond its jurisdiction. The appellate court held that while there was general subject matter jurisdiction under the Uniform Arbitration Act the trial court lacked specific subject matter jurisdiction.

The trial court lacked the inherent power to resolve the dispute between the parties pursuant to their agreement. The appellate court held that the parties had a contractual agreement to arbitrate. The agreement was to arbitrate in New York. The fact that the arbitration proceeded in Chicago rendered the award and any judgment thereon void.

In *CPM Productions* the court explained why the judgment was void as not being within the inherent power of the court. The court stated:

> "... "Subject-matter jurisdiction" refers to the court's power both to entertain and determine the general question presented by the case and to grant the particular relief requested. 742 N.E.2d at 397.
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> * * *
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> The arbitration clause in the parties' contract unequivocally provided for arbitration in New York. The arbitration hearing, however, occurred in Chicago, upon request of CPM. Consequently, the Circuit Court, while having the original power over the case generally, lacked the authority to act on the award. 742 N.E.2d at 400."

Just as the judgment on the arbitration award was void in *CPM Productions* the order of the Commission entered June 18, 2003 is void as the Commission lacked subject-matter jurisdiction to find that counties and townships are "municipally owned" utilities.

If the Commission exceeds its power, its actions are void and unenforceable and may be challenged and set aside at any time. In *CPM* the court stated:

> "Although *Mobb Deep* never challenged the Circuit Court's authority below and raises this matter for the first time on review, the asserted lack of the Circuit Court's authority to exercise its subject-matter jurisdiction can be raised at any time, including for the first time on appeal. 742 N.E.2d at 396.

Explaining that a judgment entered without inherent power is a void judgment was explained by the court in *Schak v. Vlom*, 334 Ill. App.3d 129, 777 N.E.2d 635 (1st Dist. 2002) as follows:

> . . . A judgment or order is void where it is entered by a court or agency

> which lacks personal jurisdiction, subject-matter jurisdiction, or the inherent power to enter the particular judgment or order, or where the order is procured by fraud . . . An order is also void where the court exceeded its authority . . . A void order is a complete nullity from its inception and has no legal effect and may be attacked, either directly or collaterally, at any time or in any court . . . Courts have a duty to vacate and expunge void orders from court records and thus may *sua sponte* declare an order void. 777 N.E.2d at 640.

In *Siddens v. Industrial Commission*, 304 Ill. App.3d 506, 711 N.E.2d 18 (4th Dist. 1999) the court similarly held that void judgments may be challenged at any time. The court stated the "void judgment is a complete nullity" rule stating:

> ". . . a void order is a complete nullity from its inception and has no legal effect . . . a void order may be attacked either directly or collaterally, at any time and any court. 711 N.E.2d at 22-23.

The Commission had no subject matter jurisdiction over counties and townships who are affected by its order when they are not the "affected persons" who requested the declaratory ruling. The order of the Commission was in response to the petition for declaratory ruling of IACE. IACE is not a township. IACE is not a county. IACE being neither a county nor a township is not effected by the Commission's order. The Commission had no power to entertain the request for declaratory ruling of IACE. As such the Commission is without subject matter jurisdiction to bind counties and townships by its order of June 18, 2003.

For the reasons set forth above it is respectfully requested that the Commission withdraw or revoke its June 18, 2003, order as it is void. The order exceeds the scope of authority given to the Commission by statute. The order exceeds the jurisdiction of the Commission.

II. THE COMMISSION ERRED IN FINDING THAT COUNTIES AND TOWNSHIPS ARE SUBJECT TO THE ILLINOIS UNDERGROUND UTILITIES FACILITIES DAMAGE PREVENTION ACT AS "MUNICIPALLY OWNED" UTILITIES.

Should the Commission disagree with Petitioners' arguments that it lacked jurisdiction and exceeded its statutory authority by its order of June 18, 2003, the next question to be resolved is one of statutory construction. The Commission's order of June 18, 2003, acknowledged that the Commission lacked sufficient information to determine whether any specific counties or townships are "mutually owned" utilities. The Commission further concluded that counties and townships are not "public utilities."

At dispute is the Commission's finding that Illinois counties and townships are required to participate in the state-wide one-call notice system as "municipally owned" utilities. This is a matter of statutory construction. Unfortunately, the Commission has erred in construing that "municipally owned" utilities can include counties and townships.

At issue here is the interpretation of § 2.2 of the Act which states:

> "Underground utility facilities" or "facilities" means and includes wires, ducts, fiberoptic cable, conduits, pipes, sewers, and cables and their connected appurtenances installed beneath the surface of the ground by a public utility (as is defined in the Illinois Public Utilities Act, as amended), or by a municipally owned or mutually owned utility *providing a similar utility service*, except an electric cooperative. . .

The Commission erred in the conclusion of its June 18, 2003 order wherein it stated:

> Therefore, regardless of whether a political subdivision or municipal corporation owning or operating underground utility facilities can be considered a public utility, they are still required to participate in the System as *municipally owned utilities*. In Docket No. 02-0345, the Commission adopted a broad definition of "municipal," one that included units of local government. Clearly townships and counties are units

> of local government. To the extent that they own or operate underground utility facilities, they are therefore subject to the Act. P. 8-9 of the Commission's Order (emphasis added.)

This is a matter of statutory construction. The statute includes the phrase "municipally owned." The Commission erred in interpreting the statutory language "municipally owned" as including townships and counties. Statutory interpretation is to be done looking at words the legislature uses. The Commission may not usurp the legislature by including words or changing definitions provided by the legislature in our

The Supreme Court, in the recent decision of *Krohe v. City of Bloomington*, 204 Ill.2d 392, 789 N.E. 2d 1211 (2003), summarized the rules of statutory construction as follows:

> The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. (Citation omitted.) The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. (Citation omitted.) Where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction. (Citation omitted.) If the statutory language is ambiguous, however, we may look to other sources to ascertain the legislature's intent. (Citation omitted.) The construction of a statute is a question of law that is reviewed *de novo*. (Citation omitted.)

See also, Wernikoff v *RCM Telecom Services of Illinois, Inc.*, 2003 WL 21295488 (1st Dist. 2003). Statutory language is considered to be ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different ways. *Wernikoff*, 2003 WL 21295499.

The phrase in need of interpretation here is "municipally owned" utility. That phrase is not defined anywhere in the Act.

The language of the statute "municipally owned" is capable of being understood in two or more different ways. IACE understands that "municipally owned" refers to cities,

villages and towns but not counties and townships. Conversely, the Commission has interpreted the phrase as including counties and towns.

It is important to note that the legislature has defined "municipality, "counties" and "townships" in various legislative enactments. The legislature has carefully chosen when to use the word "municipal" or "municipality" in contrast with when it uses the word "county," "township," or the phrases "local government" or "body politic." It is a general rule of law that it can be presumed that the general assembly, in using different words in different contexts, wanted the words are to have specific and different meanings.

In construing a statute, courts presume that the General Assembly, in the enactment of legislation, did not intend absurdity, inconvenience or injustice. *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 732 N.E.2d 528, 535 (2000). In construing a statute it is improper for a court to depart from the plain language by reading into it exceptions, limitations, or conditions which conflict with clearly expressed legislative intent. *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 639 N.E.2d 1282, 1287 (1994).

Counties, townships and municipalities are separate statutory creations. They are different and distinct types of governmental bodies. Municipalities include cities, villages and towns. Each separate type of government entity possesses only those rights and powers granted to them by their respective enabling statutes.

"Municipalities" are defined in the Municipal Code as including "cities, villages and towns." 65 ILCS 5/1-1-1 through 65 ILCS 105/1. Municipalities are empowered to own and operate public utilities (65 ILCS 5/11-117-1).

Townships are a separate type of governmental entity governed by the Illinois Township Code (60 ILCS 1/1-1 through 60 ILCS 1/305-115). The Township Code does not

grant townships the power to own and operate public utilities. Townships do have the power, pursuant to statute, to own and operate waterworks and sewerage systems (60 ILCS 1/205-10).

Counties are yet another type of governmental entity governed by the Illinois Counties Code (55 ILCS 5/1-1001 through 55 ILCS 125/11). Counties are not given a statutory grant of power to own or operate a public utility (unlike the power that is given to municipalities). Counties do have a plethora of other powers including the power to own and operate waterworks and sewerage systems. (55 ILCS 5/5-15002, § 5/5-15007, and § 5/5-15009).

In order to determine whether counties and townships are to be included within what is considered a "municipally owned" utility as referenced in the definition of "underground utility facilities," the Illinois Municipal Code provides guidance. The Illinois Municipal Code provides a definition of "municipal." The definition of "municipal" or "municipality" excludes "counties" and "townships" and includes only "cities, villages and towns."

The Illinois Municipal Code defines "municipal" or "municipality" as a "city, village or incorporated town" and specifically excludes, from the definition, a "township" or "county," among others (65 ILCS 5/1-1-2, Definitions, Illinois Municipal Code).

The definition of "municipal" or "municipality" as found in § 5/1-1-2 of the Illinois Municipal Code reads as follows:

> **5/1-1-2. Definitions**
>
> § 1-1-2. Definitions. In this code:
>
> (1) "Municipal" or "municipality" means a city, village, or incorporated town in the state of Illinois, but, unless the context otherwise provides, "municipal" or "municipality" does not include a township, town when used

> as the equivalent of a township, incorporated town that has superceded a civil township, county, school district, park district, sanitary district, or other similar governmental district. If "municipal" or "municipality" is given a different definition in any particular division or section of this Act, that definition shall control in that division or section only. (65 ILCS 5/1-1-2).

The Illinois Municipal Code grants municipalities the power to construct, own or operate a municipal public utility (65 ILCS 5/11-117-1, Illinois Municipal Code, Municipal Utilities).

Cities, villages and towns are statutory creatures. The legislature has empowered cities, villages and towns (municipalities) to own or operate a municipal in § 5/11-117-1, which reads, in pertinent part, as follows:

> **5/11-117-1. Powers conferred**
>
> § 11-117.1. Subject to the provisions of this Division 117, any municipality may (1) acquire, construct, own and operate within the corporate limits of the municipality any public utility the product or service of which, or a major portion thereof, is or is to be supplied to the municipality or its inhabitants and may contract for, purchase and sell product or service of any such utility. . . . (65 ILCS 5/11-117-1).

The Illinois Municipal Code also defines "public utility" describing what a municipal public utility may consist of. (65 ILCS 5/11-117-2, term "public utility" defined, Illinois Municipal Code). A municipal public utility includes any plant, equipment or property used for, among others, the "production, storage, transmission, sale, delivery, or furnishing of cold, heat, light, power, water. . . ." (65 ILCS 5/11-117-2(2)).

The definition of "public utility" in the Illinois Municipal Code in § 5/11-117-2, reads as follows:

> **5/11-117-2. Term "public utility" defined**

> § 11-117-2. The term "public utility," when used in this Division 117, means and includes any plant, equipment, or property, and any franchise, license, or permit, used or to be used (1) for or in connection with the transportation of persons or property, or the conveyance of telegraph or telephone messages; or (2) for the production, storage, transmission, sale, delivery, or furnishing of cold, heat, light, power, water, or for the conveyance of oil or gas by pipelines; or (3) for the storage or warehousing of goods; or (4) for the conduct of the business of a wharfinger. (65 ILCS 5/11-117-2).

Because the term "municipally" includes only cities, villages and towns and excludes "counties" and "townships," counties and townships cannot be included within the definition of a "municipally owned" utility in the Underground Utility Facilities Act.

This conclusion is buttressed by the fact that the provision in the Illinois Municipal Code granting municipalities the power to "acquire, construct, own and operate . . . any public utility the product or service of which . . . is to be supplied to the municipality or its inhabitants" or sold (65 ILCS 5/11-117-1), is not found to exist in the Illinois Counties Code for counties nor in the Illinois Township Code for townships.

Counties and townships have been granted many powers in their enabling statutes, including, among others, the power to own and operate a water works system and a sewerage system, but not the power to "acquire, construct, own and operate any public utility."

Under the rules of statutory construction, statutes which relate to the same subject matter are to be construed and read *in pari materia*. When two statutes (here the Illinois Underground Facilities Damage Prevention Act and the definition of "municipal" or "municipality" in the Illinois Municipal Code) are construed *in pari materia* and one statute contains provisions omitted from the other, the omitted provision will be read into the statute omitting such. (*In re Marriage of Pick*, 119 Ill. App. 3d 1061, 458 N.E.2d 33 (2d Dist. 1983)

(10-day limit on TRO in Code of Civil Procedure will be read into TRO issued per Marriage & Dissolution of Marriage Act not containing a 10-day limit under the rule of *in pari materia*)).

The rule was framed by the Appellate Court case of *In re Marriage of Pick*, 119 Ill. App. 3d 1061, 458 N.E.2d 33 (2d Dist. 1983), as follows:

> Where two acts *in pari materia* are construed together and one of them contains provisions omitted from the other, the omitted provisions will be applied in a proceeding under the act not containing such provisions, where not inconsistent with the purposes of the act. (*People ex rel. Killeen v. Kankakee School District No. 11* (1971), 48 Ill.2d 419, 422-23, 270 N.E.2d 36.) (458 N.E.2d at 37).

Therefore, under the rule of *in pari materia*, the definition of "municipal" or "municipality" in the Illinois Municipal Code will be applied to the term "municipally owned utility" in the Underground Utility Facilities Act and that definition excludes counties and townships from the term "municipally owned utility," limiting that term only to a public utility owned by a city, village or town.

The Public Utilities Act further provides additional authority that counties and townships are not subject to the Act as a "municipally owned" utility. Section 3-105 of the Public Utilities Act makes certain exclusions as to what is not included in the definition of a "public utility." In specific, the Act provides as follows:

> "Public utility" does not include, however:
>
> * * *
>
> 2. water companies which are purely mutual concerns, having no rates or charges for services, are paying the operating expenses by assessments upon the members of such a company and no other person;. . .
>
> * * *

> 5. sewage disposal companies which provide sewage disposal services on a mutual basis without establishing rates or charges for services, but paying the operating expenses by assessment upon the members of the company and no others; . . . 220 ILCS 5/3-105.

It is interesting that the Illinois Counties Code and the Illinois Township Code both empower counties and townships to operate waterworks and sewerage systems. Waterworks and sewerage systems are specifically excluded from the definition of public utility. 220 ILCS 5/3-105. Governmental entities such as counties and townships are not in the business of making a profit from the operation of waterworks or sewerage systems. Instead, the residents share in the operating expenses by assessment. The Public Utilities Act was not meant to impose obligations and restrictions upon counties and townships.

The use of certain words in one context and not in another indicate that the legislature meant something different by use of the different words. For example, the word "person" is defined in the Illinois Underground Utility Facilities Damage Prevention Act, as follows:

> 50/2.1. Person
>
> § 2.1. "Person" is an individual, firm, joint venture, partnership, corporation, association, *municipality or other governmental unit*, department or agency, utility cooperative, or joint stock association, and includes any trustee, receiver, assignee or personal representative thereof.

The above definition shows that where the legislature wanted to, it would use additional language other than "municipality" to include other levels of government. "Person" is defined as not only including "municipalities" but also "other governmental units". IACE submits that inclusion of the phrase "other governmental units" as was done in § 50/2.1 would include counties and townships. However, where the word "municipality" is only used that is not inclusive of counties and townships.

To see how the word "person" is used elsewhere in the Act, § 50/4 is illustrative. Section 50/4 states as follows:

> 50/4. Required activity.
>
> § 4. Every ***person*** who engages in non-emergency excavation or demolition shall: (a) take reasonable action to inform himself of the location of any underground utility facilities. . . (b) plan the excavation or demolition to avoid or minimize interference with underground utility facilities; . . .

If a county or township is engaging in excavation or demolition they are within the definition of "person" as being a "governmental unit". Under § 50/4 they are then to take reasonable action to inform themselves of underground utility facilities and plan their action to avoid and minimize interference with the facilities.

The word "person" as defined in the Act is not used anywhere in § 50/2.2 in the definition of "underground utility facilities" or "facilities". A "person" as defined in the Act which includes "governmental units" other than "municipalities" is not referred to in any way in § 50/2.2.

See also, 220 ILCS 30/3.11 of the Electric Supplier Act which defines "person" as follows:

> 30/3.11. Person.
>
> § 3.11. "Person" includes an individual, corporation, partnership, electric cooperative, public utility, association, joint stock company, trust, **incorporated municipality, municipal corporation, and any governmental entity or political subdivision thereof.** (Emphasis added.)

Where the legislature wants to it does use specific words to include the category of persons or entities whom it wants the legislation to apply to. In the Electric Supplier Act, "person" is defined as including not only municipalities and municipal corporations but also

"any governmental entity" or "political subdivision." The Illinois Underground Utilities Facilities Damage Prevention Act does not include any such language in § 50/2.2 defining "underground utility facilities" or "facilities."

A search of the Public Utilities Act has found that the legislature has made specific reference to both a "municipality" and "county" where it deems it inappropriate. In 5/8-505.1(3)(c) the legislature has made specific reference to a "public utility," a "municipality," and a "county". 220 ILCS 5/8-505.1. Where the legislature wants to it can and does include additional language to include more than what is known as a "municipality." In § 5/8-505.1(3)(c) the legislature specifically referred to municipalities as well as counties. The legislature was aware of the distinct differences between a municipality and a county. Where the legislature makes specific reference to a "municipality" that is not inclusive of a "county". Conversely, if the legislature makes reference to a "county" that is not inclusive of "municipalities" as well. Where the legislature seeks to include reference to both municipalities and counties it uses the necessary words to do so just as it did in § 5/8-505.1.

Had the legislature wanted to it could have also used additional language such as "any governmental entity or political subdivision thereof" as it used in the Electric Supplier Act. The legislature did not include those words. Not including those words the legislature obviously meant to only include municipally owned utilities. As noted above "municipal" has been defined elsewhere by the legislature as only including cities, villages and towns. This is consistent with the definition provided in the Electric Supplier Act for "incorporated" municipality, which is as follows:

30/3.8. Incorporated municipality.

> § 3.8. "Incorporated municipality" means any city, village or incorporated town. 220 ILCS 30/3.8.

It is clear that the word "municipally owned" with reference to underground facilities is meant to include only cities, villages and incorporated towns. That is a definition that is used consistently throughout other statutory provisions. Nowhere has the legislature defined "municipality" to include a county or township.

Therefore, it is respectfully suggested that the Commission grant the Petition for Rehearing as it is clear that the order of June 18, 2003, is contrary to the general rules of statutory construction. Counties and townships are not within the definition of "municipally owned" utilities. Nowhere has the legislature defined "municipal" or "municipality" to include a county or township.

The Commission erred in extending the definition of "municipally owned" to include different levels and types of governmental entities such as counties and townships other than what are known as "municipalities" throughout the many statutes of our state which includes cities, towns and villages.

III. THE COMMISSION ERRED IN FINDING THAT STORM SEWERS, CULVERTS, FIELD TILE AND ELECTRICAL LINES SERVING TRAFFIC CONTROL DEVICES ARE UNDERGROUND UTILITIES SUBJECT TO THE ACT WHERE THOSE ITEMS ARE LOCATED ON COUNTY OR TOWNSHIP PROPERTY AND ARE NOT USED TO PROVIDE UTILITY SERVICES TO CUSTOMERS.

A. COUNTIES AND TOWNSHIPS, IN USING ELECTRICITY FOR SOME TRAFFIC CONTROL SIGNALS, ARE CONSUMERS OF A UTILITY SERVICE AND NOT PROVIDERS OF A UTILITY SERVICE.

The Commission erred in finding, in its order of June 18, 2003, that electric lines serving flashing warnings, flashing stop signs or traffic signals are to be considered

municipally owned utilities subject to the Act. Counties and townships are customers of electric utility companies who need electric service to operate their traffic control signals. Counties and townships are not in the business of supplying utility services. Instead, counties and townships are customers of electric companies. Counties and townships depend on electric service to operate their traffic control signals. The Act does not govern customers. Instead, the Act is supposed to govern public utilities who provide service to individuals, companies and entities such as counties and townships.

The Illinois Highway Code Requires that Public Utilities Obtain the Written Consent for Placement of Public Utilities on County and Township Rights-of-Way.

The statutory scheme in Illinois not only excludes counties and townships from the Illinois Underground Facilities Damage Prevention Act (220 ILCS 50/1 *et seq*.) so that they are not obliged to belong to J.U.L.I.E. and mark their facilities within 48 hours upon notice, but instead, public utilities must obtain the written consent of the State, counties and townships to place their utility's facilities along and upon State, county or township roadway rights-of-way pursuant to the Illinois Highway Code (605 ILCS 5/9-113, Used By Public Utilities Co. Highway Authority Rights-of-Way Act).

The legislature has required users of public rights-of-ways to obtain written consent from highway authorities including counties and townships before using the public rights-of-way. Section 5/9-113(a) provides as follows:

> **5/9-113. Use By Public Utility Co.; Consent; Rules, Regulations and Specifications; Non-Toll Federal-Aid Fully Access-Controlled State Highways**
>
> § 9-113. (a) No ditches, drains, track, rails, poles, wires, pipeline or other equipment of any public utility company, municipal corporation or other public or private corporations, association or person shall be located, placed or constructed

> upon, under or along any highway, or upon any township or district road, without first obtaining the written consent of the appropriate highway authority as hereinafter provided for in this Section. (605 ILCS 5/9-113(a), Illinois Highway Code).

The definition of "highway authority" in the Illinois Highway Code used in § 9-113(a) includes State highway, county highway and township road as defined in § 5/2-213 of the Illinois Highway Code (605 ILCS 5/2-213, Highway Authority or Highway Authorities). Thus, while the Underground Facilities Damage Prevention Act does not apply to counties and townships and it requires owners and operators of underground facilities to record and mark their facilities within 48 hours for users thereof, the Illinois Highway Code reverses such procedure and requires users (public utilities who are members of JULIE and all others) of State, county and township rights-of-way to seek written consent from the appropriate highway authority. Hence, the "Permit System" as used by the Illinois Department of Transportation (IDOT) and counties and townships.

Under the statutory scheme, municipalities (cities, villages and towns) are treated differently than counties and townships. Municipally owned utilities must belong to J.U.L.I.E., if they provide public utilities, and upon notice of the user, must mark their facilities for users. On the other hand, counties and townships are not empowered to own public utilities. Counties and townships are not obliged to belong to J.U.L.I.E. as they are not "municipally owned" utilities. Instead, users of public property belonging to counties and townships, such as public utilities, must obtain the written consent of counties and townships before using their property, highway rights-of-way.

The staff of the Illinois Commerce Commission correctly noted in their response to a request for declaratory ruling that "just because a facility is installed underground does not, in and of itself, make it an underground utility facility. Storm sewers, culverts, field tile and

buried electrical lines used for traffic signals do not fall within the definition of "underground utility facilities." "Thus, there is no need for a county or township to join the System if its storm sewers, culverts, field tile and buried electrical lines for traffic controls are not used for providing utility service." (Emphasis in original.)

The maintenance of traffic control devices is the responsibility of the public agency or official having jurisdiction over it. The Illinois Highway Code, 605 ILCS 5/2-212 specifies who is responsible as a particular highway authority. For a county highway, it is the County Board. For a township road, it is the Highway Commissioner. 605 ILCS 2-212.

Nowhere in the Public Utilities Act nor in the Underground Utility Facilities Damage Prevention Act is there any language indicative that the operation of a traffic control system by a governmental entity such as a county or township is the providing of a utility service. To the extent that counties and townships need electricity to operate certain traffic control devices, they are consumers of a utility service. They are not the providers of utility service. Their traffic control devices are located on their property.

IACE submits that should the Commission disagree, § 5/17-500 of the Public Utilities Act removes jurisdiction from the Commission of any municipal electrical system. That section provides as follows:

> 5/17-500. Jurisdiction.
>
> § 17-500. Jurisdiction. Except as provided in the Electric Supplier Act, the Illinois Municipal Code, and this Article XVII, the **Commission**, or any other agency or subdivision thereof of the State of Illinois or any private entity **shall have no jurisdiction over any electric cooperative or municipal system** regardless of whether any election or elections as provided for herein have been made, **and all control regarding an electric cooperative or municipal system shall be vested in the electric cooperative's board of directors or trustees or the applicable governing body of**

> **the municipal system**. 220 ILCS 5/17-500 (Emphasis added.)

IACE submits that any electricity used for traffic control signals of counties and townships is not the providing of a utility service. However, should the Commission still disagree IACE submits that the Commission lacks jurisdiction over any electric municipal system pursuant to § 5/17-500.

Counties and townships using electric to provide certain traffic control signals are not providing a utility service. Instead, they are consumers of a utility. Because of that the Commission erred in its order of June 18, 2003 in concluding that electric lines serving flashing warnings, flashing stop signs, or traffic signals should be considered municipally owned facilities subject to the Act.

B. COUNTIES AND TOWNSHIPS WHICH MAY HAVE STORM SEWERS, CULVERTS OR FIELD TILE ON THEIR PROPERTY ARE NOT PROVIDING UTILITY SERVICES TO CUSTOMERS.

The Commission erroneously concluded, in the June 18, 2003, order that storm sewers, culverts and field tile are to be considered municipally owned utilities subject to the Act. Counties and townships are empowered to own and operate water and sewage systems. The Illinois Township Code empowers townships to own and operate a waterworks and sewerage system but not to own and operate a public utility. (60 ILCS 1/205-10). Similarly, counties are not empowered to own and operate public utilities but they are empowered to own and operate waterworks and sewerage systems (55 ILCS 5/5-15002, § 5/5-15007, and § 5/5-15009).

Counties and townships, in having storm sewers, culverts and field tiles along and upon their property, are not providing a utility service to others. They are providing storm

sewers, culverts and field tile to remove water from their own property. Storm sewers, culverts and field tile are used to divert excess water. Counties and townships are not in the business of providing utility service for others in having storm sewers, culverts or field tile on their property.

In defining public utility in the Public Utility Act, 220 ILCS 5/3-105 the legislature excluded certain types of activities. That section specifically provides the following with respect to exclusions:

> 5/3-105. Public utility.
>
> "Public utility" does not include, however:
>
> * * *
>
> 2. water companies which are purely mutual concerns, having no rates or charges for services, but paying the operating expenses by assessment upon the members of such a company and no other person; . . .
>
> * * *
>
> 5. sewage disposal companies which provide sewage disposal services on a mutual basis without establishing rates or charges for services, but paying the operating expenses by assessment upon the members of the company and no others;. . . 220 ILCS 5/3-105.

Counties and townships which have storm sewers, culverts and field tile on their property are not "municipally owned" utilities. They are taking care of their own property as they deem fit. Counties and townships which may have storm sewers, culverts and field tile on their property may be water companies or sewage disposal companies which are excluded as public utilities.

The Commission erred in finding that counties and townships which may have storm sewers, culverts and field tiles on their property are municipally owned utilities subject to the

Act. Because of that, it is respectfully requested that the June 18, 2003 order be revoked.

CONCLUSION

The Commission Lacked Sufficient Information to Determine Whether Any Specific County or Township Could be a Mutually Owned Utility Because a Proper Petition for Declaratory Ruling Was Not Filed by an "Affected Person"

Unfortunately, the Commission was placed in a difficult position with the Petition for Declaratory Ruling filed by IACE. The Commission did note in its June 18, 2003, order that it "lacked sufficient information to determine whether specific counties or townships are mutually owned utilities." IACE acknowledges that is a correct conclusion on the part of the Commission.

Unfortunately, the Commission likewise lacks sufficient information as to any particular county or township which may be an affected person. The Commission was placed in a difficult position when it was not given sufficient facts as to a particular scenario affected any particular county or township when it was asked to determine whether buried electric for traffic signals, storm sewers, culverts or field tile would be subject to the Act.

It is because of the lack of sufficient information and facts that the Commission has no jurisdiction. Had a Petition for Declaratory Ruling been filed by an "affected person" the Commission would have a much better chance of receiving sufficient facts on a particular scenario to render a proper order. The Commission would also then have had jurisdiction and would not have exceeded the scope of its authority.

WHEREFORE, for the reasons set forth above, the Illinois Association of County Engineers (IACE) and the Township Officials of Illinois (TOI) respectfully request that the

Commission grant their Petition for Rehearing and that the Commission revoke or revise its order of June 18, 2003 pursuant to § 200.220(j).

Respectfully Submitted,

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JUDGE, JAMES & KUJAWA, LLC
JAY S. JUDGE
Attorney for the ILLINOIS ASSOCIATION OF COUNTY ENGINEERS and TOWNSHIP OFFICIALS OF ILLINOIS

AFFIDAVIT OF ATTORNEY

I, Jay S. Judge, being duly sworn and under oath, do depose and state that I am a licensed attorney in the State of Illinois and that, were I called upon to give testimony from my own personal knowledge as to the matter set forth in this Petition for Rehearing, the statements herein made are accurate, true and correct.

_____
AFFIANT JAY S. JUDGE
Attorney for the ILLINOIS ASSOCIATION OF COUNTY ENGINEERS and TOWNSHIP OFFICIALS OF ILLINOIS

SUBSCRIBED and SWORN TO before me

this 17th day of July, 2003

_____
NOTARY

JAY S. JUDGE — #1373293
JUDGE, JAMES & KUJAWA, LLC